

# Native American Cases To Watch In 2nd Half Of 2020

By [ [HYPERLINK "https://www.law360.com/nativeamerican/articles/1296190/native-american-cases-to-watch-in-2nd-half-of-2020?nl\\_pk=894dd615-1d89-41ce-b438-7f19a35e0818&utm\\_source=newsletter&utm\\_medium=email&utm\\_campaign=nativeamerican"](https://www.law360.com/nativeamerican/articles/1296190/native-american-cases-to-watch-in-2nd-half-of-2020?nl_pk=894dd615-1d89-41ce-b438-7f19a35e0818&utm_source=newsletter&utm_medium=email&utm_campaign=nativeamerican) ]

Law360 (July 31, 2020, 10:43 AM EDT) -- Native American law practitioners will be keeping an eye on the full Fifth Circuit's upcoming decision on the constitutionality of the Indian Child Welfare Act, an Eighth Circuit dispute over whether a federal worker safety law applies to a Minnesota tribe's fishing company, and U.S. Supreme Court oral arguments with implications for tribal provisions of the Affordable Care Act.

Here's a look at those cases and more that attorneys will be watching closely for the rest of 2020.

Brackeen et al. v. Bernhardt et al.

The en banc Fifth Circuit is weighing whether to overturn a Texas federal judge's ruling that the Indian Child Welfare Act is unconstitutionally race-based, in a decision expected to be appealed to the U.S. Supreme Court however it's decided.

The full court is reviewing the case after a Fifth Circuit panel [ [HYPERLINK "https://www.law360.com/articles/1187422/5th-circ-rules-indian-child-welfare-act-constitutional"](https://www.law360.com/articles/1187422/5th-circ-rules-indian-child-welfare-act-constitutional) ] to the federal government and tribes including the [ [HYPERLINK "https://www.law360.com/agencies/cherokee-nation"](https://www.law360.com/agencies/cherokee-nation) ], [ [HYPERLINK "https://www.law360.com/agencies/morongo-band-of-mission-indians"](https://www.law360.com/agencies/morongo-band-of-mission-indians) ] of Mission Indians, [ [HYPERLINK "https://www.law360.com/agencies/oneida-tribe-of-indians-of-wisconsin"](https://www.law360.com/agencies/oneida-tribe-of-indians-of-wisconsin) ] and [ [HYPERLINK "https://www.law360.com/agencies/quinalt-indian-nation"](https://www.law360.com/agencies/quinalt-indian-nation) ] in August 2019 by reversing the lower court's decision striking down the law.

ICWA is designed to preserve American Indian families by imposing federal standards in state custody cases involving Indian children. The panel's ruling centered on its holding that ICWA isn't race-based, but rather makes a political classification of "Indian child" that's within Congress' purview to legislate in tribal affairs.

But Texas, Louisiana, Indiana and a group of adoptive parents convinced the circuit court to rehear the case, [ [HYPERLINK "https://www.law360.com/articles/1232330/states-urge-5th-circ-to-keep-ruling-icwa-is-unconstitutional"](https://www.law360.com/articles/1232330/states-urge-5th-circ-to-keep-ruling-icwa-is-unconstitutional) ] prior to January oral arguments that the lower court had rightly found the 42-year-old law violated the Constitution's anti-commandeering doctrine by forcing states to carry out its requirements.

The case is important for tribes protecting their members, since "as far as the day-to-day business of what tribal governments do, ICWA is such a huge part of their bread and butter," but also implicates broader legal questions, said Forrest Tahdooahnippah, a partner at [ [HYPERLINK "https://www.law360.com/firms/dorsey-whitney"](https://www.law360.com/firms/dorsey-whitney) ] and an enrolled member of the [ [HYPERLINK "https://www.law360.com/agencies/comanche-nation"](https://www.law360.com/agencies/comanche-nation) ] of Oklahoma.

"Because there are arguments raised about equal protection and things that go to the core of what Indian law is, if it's a constitutional problem to have a statute that is singling out Indians, then the whole field is at risk," Tahdooahnippah said.

The case is Brackeen et al. v. Bernhardt et al., case number [ [HYPERLINK "https://www.law360.com/cases/5bf31b66250c83363ab22aae"](https://www.law360.com/cases/5bf31b66250c83363ab22aae) ], in the [ [HYPERLINK "https://www.law360.com/agencies/u-s-court-of-appeals-for-the-fifth-circuit"](https://www.law360.com/agencies/u-s-court-of-appeals-for-the-fifth-circuit) ].

Scalia v. [ [HYPERLINK "https://www.law360.com/agencies/red-lake-nation"](https://www.law360.com/agencies/red-lake-nation) ].

The question of when or whether tribal businesses should be subject to generally applicable federal laws is at stake in the [ [HYPERLINK "https://www.law360.com/articles/1284459/osh-says-tribal-fishing-co-must-submit-to-regulation"](https://www.law360.com/articles/1284459/osh-says-tribal-fishing-co-must-submit-to-regulation) ] of the enforcement of the Occupational Safety and Health Act on a fishing company owned by Red Lake Band of Chippewa Indians.

The [ [HYPERLINK "https://www.law360.com/agencies/u-s-department-of-labor"](https://www.law360.com/agencies/u-s-department-of-labor) ]'s [ [HYPERLINK "https://www.law360.com/agencies/occupational-safety-and-health-administration"](https://www.law360.com/agencies/occupational-safety-and-health-administration) ] is seeking to overturn an independent federal agency's ruling that Red Lake Nation Fisheries Inc. didn't have to submit to an OSHA inspection after two company employees drowned.

While Red Lake has argued that OSHA is threatening to infringe on the tribe's sovereign power to create and enforce its own workplace safety regulations, as well as to exclude nonmembers from its reservation, the agency contends that the tribe hasn't pointed to any treaty right to run its fishery without federal health and safety regulation and that the tribe

doesn't have the right to exclude OSHA inspectors.

The case could create a split with the Ninth Circuit if the Eighth Circuit applies a more favorable test for when generally applicable statutes apply to tribes, but the panel may try to avoid a split by basing its ruling more narrowly on the Red Lake Band's treaty rights, [ [HYPERLINK "https://www.law360.com/firms/faegre-drinker"](https://www.law360.com/firms/faegre-drinker) ] associate Josh Peterson said.

"It's an interesting case for that reason, that there's another path they can go," Peterson said.

The case is the latest to gauge to what degree federal judges are willing to treat tribal governments on a par with other sovereigns in applying federal laws, said [ [HYPERLINK "https://www.law360.com/firms/hogan-lovells"](https://www.law360.com/firms/hogan-lovells) ] partner Hilary Tompkins, a [ [HYPERLINK "https://www.law360.com/agencies/navajo-nation"](https://www.law360.com/agencies/navajo-nation) ] member and former [ [HYPERLINK "https://www.law360.com/agencies/u-s-department-of-the-interior"](https://www.law360.com/agencies/u-s-department-of-the-interior) ] solicitor.

"The real troubling aspects of the cases here and under the National Labor Relations Act is that many of these federal laws exempt states and local governments," Tompkins said. "They recognize that government entities are unique sovereigns that can govern themselves on these issues, yet somehow tribes are cast aside as inferior sovereigns that need federal oversight, when Congress has never indicated that should be the case."

The case is *Eugene Scalia, Secretary of Labor v. Red Lake Nation Fisheries Inc.*, case number 19-3373, in the [ [HYPERLINK "https://www.law360.com/agencies/u-s-court-of-appeals-for-the-eighth-circuit"](https://www.law360.com/agencies/u-s-court-of-appeals-for-the-eighth-circuit) ].

California et al. v. Texas et al.

A high-profile Supreme Court battle over the fate of the Affordable Care Act could have massive consequences for tribes if the law is struck down and its Native American health provisions are swept away.

The key issue in the suit, originally brought in 2018 by Texas Attorney General Ken Paxton and fellow Republican attorneys general, is likely to be whether parts of the law can be severed and preserved if the justices decide the law's individual mandate must go.

Tribes' interests are very much at stake, as the Indian Health Care Improvement Act and other parts of the ACA undergirding the tribal health care system could be lost if the high court decides they can't be severed.

A slew of tribes and tribal organizations told the high court in a [ [HYPERLINK "https://www.law360.com/articles/1273432/tribes-urge-justices-to-keep-aca-s-indian-health-measures"](https://www.law360.com/articles/1273432/tribes-urge-justices-to-keep-aca-s-indian-health-measures) ] that updated Native American health provisions were included in the ACA in 2010 for the sake of convenience and there's no reason they can't be severed.

"If the entire act is invalidated by the courts, those Indian provisions would be struck down as collateral damage in the lawsuit, even though they have nothing to do with the individual mandate," said Geoffrey D. Strommer of [ [HYPERLINK "https://www.law360.com/firms/hobbs-strauss"](https://www.law360.com/firms/hobbs-strauss) ], who represents the tribes and tribal organizations that filed the brief.

The Trump administration, which is arguing that the whole law should be struck down, "disturbingly ... ignored the federal responsibility to tribes by failing to even mention the Indian provisions of the ACA" in its June brief, Strommer said.

Oral arguments in the case have not yet been scheduled but are likely to be in November.

The cases are California et al. v. Texas et al., case number [ [HYPERLINK "https://www.law360.com/cases/5e0fa141628dc006cef66aeb"](https://www.law360.com/cases/5e0fa141628dc006cef66aeb) ], and Texas et al. v. California et al., case number [ [HYPERLINK "https://www.law360.com/cases/5e470ede5863c5067f8bd990"](https://www.law360.com/cases/5e470ede5863c5067f8bd990) ], in the [ [HYPERLINK "https://www.law360.com/agencies/u-s-supreme-court"](https://www.law360.com/agencies/u-s-supreme-court) ].

## Around the Country

Elsewhere, the Cherokee Nation is resisting motions to dismiss its [ [HYPERLINK "https://www.law360.com/articles/1282010/chokeee-nation-fights-bid-to-nix-opioid-bellwether"](https://www.law360.com/articles/1282010/chokeee-nation-fights-bid-to-nix-opioid-bellwether) ] in Oklahoma federal court; tribes continue to join a [ [HYPERLINK "https://www.law360.com/articles/1283322/native-american-tribes-say-juul-targeted-them-with-vapes"](https://www.law360.com/articles/1283322/native-american-tribes-say-juul-targeted-them-with-vapes) ] claiming [ [HYPERLINK "https://www.law360.com/companies/juul-labs-inc"](https://www.law360.com/companies/juul-labs-inc) ]. and others targeted tribes' young members; the Navajo Nation is [ [HYPERLINK "https://www.law360.com/articles/1285940/navajo-nation-sues-epa-over-altered-water-protection-rules"](https://www.law360.com/articles/1285940/navajo-nation-sues-epa-over-altered-water-protection-rules) ] to rescind the 2015 Clean Water Rule as a violation of its treaty rights and federal law; the [ [HYPERLINK "https://www.law360.com/agencies/cheyenne-river-sioux-tribe"](https://www.law360.com/agencies/cheyenne-river-sioux-tribe) ] Tribe is

alleging a [ HYPERLINK "<https://www.law360.com/agencies/bureau-of-indian-affairs>" ] official retaliated for the tribe's [ HYPERLINK "<https://www.law360.com/articles/1286248>" ]; the federal government is pressing its Supreme Court petition [ HYPERLINK "<https://www.law360.com/articles/1295576/crow-tribe-native-groups-back-feds-on-tribal-police-power>" ] to detain and search a non-Indian; Energy Transfer LP is [ HYPERLINK "<https://www.law360.com/articles/1293932/pipeline-shutdown-shouldn-t-be-paused-tribes-tell-dc-circ>" ] to overturn an order to shut down the Dakota Access pipeline; and the Penobscot Nation is [ HYPERLINK "<https://www.law360.com/articles/1292159/lawmakers-back-penobscot-nation-rights-in-maine-river>" ] in its namesake river before the full First Circuit.

--Editing by Aaron Pelc and Sarah Golin.